

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOE HOLCOMBE, et. al,	§	NO. 5:18-CV-00555-XR
	§	
Plaintiffs	§	Consolidated with:
	§	5:18-cv-00712-XR (<i>Vidal</i>)
	§	5:18-cv-00881-XR (<i>Uhl</i>)
vs.	§	5:18-cv-00944-XR (<i>Ramsey</i>)
	§	5:18-cv-00949-XR (<i>McNulty</i>)
UNITED STATES OF	§	5:18-cv-00951-XR (<i>Wall</i>)
AMERICA,	§	5:18-cv-01151-XR (<i>Amador</i>)
	§	5:19-cv-00184-XR (<i>Brown</i>)
Defendant	§	5:19-cv-00289-XR (<i>Ward</i>)
	§	5:19-cv-00506-XR (<i>Workman</i>)
	§	5:19-cv-00678-XR (<i>Colbath</i>)
	§	5:19-cv-00691-XR (<i>Braden</i>)
	§	5:19-cv-00706-XR (<i>Lookingbill</i>)
	§	5:19-cv-00714-XR (<i>Solis</i>)
	§	5:19-cv-00715-XR (<i>McKenzie</i>)
	§	5:19-cv-00805-XR (<i>Curnow</i>)
	§	5:19-cv-00705-XR (<i>Workman</i>)
	§	5:19-cv-00806-XR (<i>Macias</i>)

UNITED STATES' MOTION TO COMPEL

INTRODUCTION

At the hearing of April 28, 2020, the Court authorized the United States to take the depositions of Michael and Rebecca Kelley, the parents of the Sutherland Springs shooter, Devin Kelley, and Danielle Smith, Devin's widow (collectively, "the Deponents"). The United States issued deposition subpoenas to those individuals through their attorneys. None of the Deponents filed a protective order or otherwise sought relief from the Court concerning their pending testimony.

Nonetheless, on June 23, Gerald E. Bourque, Esq. and J. Dean Jackson, Esq., counsel for Michael Kelley, obstructed the deposition of their client and demanded that counsel for the United States explain the steps they took to provide immunity for their clients from any possible criminal investigation related to the Sutherland Springs shooting. When Government counsel attempted to proceed, Michael Kelley, based on the advice of his counsel, asserted his Fifth Amendment right against self-incrimination in response to virtually every question, including those that could not possibly lead to self-incrimination such as details regarding their settlement of related claims. Mr. Bourque insulted counsel for the United States, addressing him multiple times as "big boy" and, in one instance, threatening him by saying, "And you're very fortunate you're not in this room with me in person right now. You got that?" (Ex. A. Dep. Tr. at 16:3-4; 30:3-4; 39:10-12; 30:12-16). Indeed, the conduct of Mr. Bourque, as well as J. Dean Jackson Esq., in making improper, argumentative, and meritless objections during the deposition, was unprofessional at best, and clearly designed to impede the judicial process and intimidate United States' counsel.

In purporting to justify his obstructionist conduct, Mr. Bourke alluded to a letter he sent to counsel for the United States on May 14, 2020. (Ex. B). However, as explained in the United States' brief in opposition to Michael Kelley's motion to quash the Government's subpoena for

documents, the assertion of the Fifth Amendment privilege against self-incrimination cannot be based on a vague and speculative concern of criminal jeopardy. The Kelleys' counsel failed to raise the issue again after the Government filed its opposition brief regarding the Fifth Amendment issue, despite a telephonic conferral and numerous correspondence. More importantly, any concerns of criminal jeopardy do not excuse Mr. Kelley's excessive invocation of the Fifth Amendment or his counsel's improper behavior. Given the obstructions, the United States had no choice but to suspend the deposition, delay Rebecca Kelley's deposition (which was scheduled for later that day), and file this motion to compel.

Within one hour of the United States suspending Michael Kelley's deposition, counsel for Danielle Smith, Daniel Horowitz, notified the United States that his client also needed a guarantee of immunity or otherwise would "plead the 5th." (Ex. C). Despite prior correspondence regarding Ms. Smith's deposition,¹ Mr. Horowitz demanded immunity for Ms. Smith immediately after Mr. Bourque insisted on the same during the deposition of his client, Mr. Kelley. The letter Mr. Horowitz sent to undersigned counsel is almost word-for-word the same letter Mr. Bourque had sent previously.

Consequently, the United States seeks to compel the depositions of Michael Kelley, Rebecca Kelley, and Danielle Smith. The United States respectfully requests that the Court rule on the appropriateness and scope of any future invocation of their Fifth Amendment right against

¹ Indeed, the Plaintiffs themselves previously noticed Danielle Smith's deposition, and Mr. Horowitz did not raise any immunity issues. It was not until the United States objected to the notice and issued its own notice that Mr. Horowitz raised any concerns about the deposition.

self-incrimination by the Deponents prior to their depositions.² Additionally, the Government respectfully submits that Mr. Bourque and Mr. Jackson's conduct was sanctionable.

BACKGROUND

In a Joint Status Update, the United States requested authorization to depose Michael Kelley, Rebecca Kelley, and Danielle Smith. (ECF No. 212). The Government explained that the depositions would concern Devin's propensity for violence prior to the Sutherland Springs shooting; his acquisitions and modification of firearms and preparation for the shooting; his relationship with various family members and (if any) members of the congregation; circumstances surrounding his voluntarily admission into Peak Behavioral Health Services; and his ability to acquire firearms through means other than a federally-licensed firearms dealer.³

Plaintiffs did not dispute the requests. Indeed, several of the plaintiffs in these consolidated cases brought an action against the Kelleys, alleging negligence and gross

² Please note that the deposition of Michelle Shields, Devin's mother-in-law, was scheduled for July 6, 2020. In arranging the logistics of the deposition, Ms. Shields informed counsel for the United States that she is not represented by counsel. It is therefore unknown whether Ms. Shields has received any legal advice about being deposed in this case or whether she has any concerns about criminal jeopardy. However, because the topics covered in the examinations of all of the people who knew Devin Kelley (including Ms. Shields) will be similar, it is conceivable that Ms. Shields may invoke her 5th Amendment right to remain silent in the same manner as Mr. Kelley did in his deposition. Accordingly, out of an abundance of caution, the United States postponed the July 6 deposition. The Government requests that any order regarding the appropriateness of invoking the 5th Amendment also apply to Ms. Shields.

³ Evidence concerning Devin Kelley's motives for targeting the church and its members is pertinent to determining causation. Data collected by local, state, and federal investigators from witnesses who knew Devin well (*i.e.*, Michael and Rebecca Kelley, Danielle Smith, and Michelle Shields, Danielle's mother) may provide evidence that Devin, after a series of deeply disturbing events (some of which occurred a few days before the shooting), specifically and methodically sought out revenge on Michelle Shields and members of her church who he thought had been tormenting his family for years.

negligence because they “turned a blind eye” to Devin’s abusive behavior and use of firearms while he lived with them at the time of the mass shooting. *Lookingbill, et al., v. Michael Kelley and Rebecca Kelley*, Case No. C2020-393C, at *9 (Dist. Ct. Bexar Cty.). The United States has not impleaded the Kelleys or Danielle Smith, nor did it identify them as potential responsible third parties.

The Court granted the request for their depositions during a status conference on April 28, 2020. Following the Court’s ruling, counsel for the United States contacted J. Dean Jackson, counsel for the Kelleys in the *Lookingbill* case. Government counsel sought to coordinate the depositions and inform Mr. Jackson that the Government would be issuing a subpoena for documents prior to the deposition. On May 6, Mr. Jackson sent an email to all parties in this litigation, introducing Gerald E. Bourque, a criminal defense lawyer who had been retained by the Kelleys.

That evening, the United States issued subpoenas to produce documents to Michael and Rebecca Kelley. The United States informed Mr. Jackson and Mr. Bourque that once the documents have been produced, the Government would be ready to move forward with the depositions.

On May 14, Mr. Bourque sent a letter to counsel for the United States. The letter first requested a copy of each and every statement given by the Kelleys to federal or state law-enforcement agencies in relation to the shooting. The letter then made the broad assertion that: “Any acquaintance of the perpetrator would be investigated as targets for indictment.” The letter therefore requested that the United States:

provide a letter stating that neither Michael Kelley nor Rebecca Kelley are targets of a criminal investigation at this time and that answers they give in response to questions during the deposition will

not lead to either of them becoming targets of a criminal investigation with the United States Department of Justice. In other words, provide a letter stating they are not now targets of a criminal investigation and that they will never be targets of a criminal investigation for anything related to the Sutherland Springs incident.

Less than a week later, and before the United States responded to the May 14 letter, the Kelleys filed a Motion to Quash Subpoena *Duces Tecum*, Motion for a Protective Order, and, Alternatively, Objections to Subpoena *Duces Tecum*. (ECF No. 224). The motion did not mention the May 14 letter or raise the issue of requesting immunity. In its opposition brief, the United States responded to the Kelleys' assertion of their Fifth Amendment right against self-incrimination by noting that they failed to demonstrate that criminal jeopardy is anything but a "remote and speculative possibility." (ECF No. 225).

On May 29, the Court ordered the parties to meet and confer regarding the motion. (ECF 226). Counsel for the United States spoke via conference call with Mr. Jackson on June 2. Counsel for the United States specifically asked whether Mr. Bourque would join the call. Mr. Jackson stated that Mr. Bourque was unavailable for the call and assured the Government that the meet and confer could proceed without him. During the call, the parties agreed that the Kelleys' motion was largely moot because, as previously stated in a letter to the United States, the Kelleys did not possess responsive documents.⁴

⁴ In a letter dated May 21, Mr. Jackson wrote that the Kelley "have given everything they had" to various federal and state government. (Ex. D). In a subsequent email date May 26, Mr. Jackson reiterated that the Kelley did not have any responsive documents, with the notable exception of letters that they wrote to Devin Kelley while he was in basic military training. (Ex. E). Mr. Jackson proposed an in-camera inspections of the letter by the Court to determine their relevance. The United States told Mr. Jackson that an in-camera review would not be necessary – based on Mr. Jackson's characterization of the letters, the United States would stipulate that they were not responsive to the subpoena request.

The conversation then turned to the scheduling of the depositions. Without mentioning any concerns regarding immunity or his client's invocation of their Fifth Amendment rights, Mr. Jackson reiterated his desire to schedule the depositions at a time convenient for all parties. Shortly after the meet and confer, the Kelleys withdrew their motion. (ECF No. 229). And, after significant coordination between the parties concerning logistical matters, the United States, believing it was proceeding with the full cooperation of their counsel, issued subpoenas for the depositions of Michael and Rebecca Kelley.

The Kelleys did not raise any objections while the parties scheduled the depositions, nor did they file a motion for a protective order. Similarly, counsel for Danielle Smith never raised the issue of self-incrimination or a request for immunity during the scheduling of her deposition.

Shortly after Mr. Kelley's deposition started on June 23, Mr. Bourque interjected by insisting to know what efforts the United States took in response to his May 14 letter. Ex. A at 11:22-14:1, 20:10-21:19. Mr. Bourque questioned "the government's good-faith intentions in this deposition," *id.* at 13:20-22, and Mr. Jackson accused the Government attorneys of taking the deposition as a pretext to gather evidence for an indictment. *Id.* at 16:5-20. When Government counsel indicated that any instructions not to answer would have to be made question by question, Plaintiffs' counsel objected, and Mr. Jackson stated "I will shut this deposition down if we go question by question just to intimidate and harass my clients." *Id.* at 17:9-18:3.

Mr. Kelley asserted his Fifth Amendment right to remain silent to every subsequent question, including questions that could not possibly elicit self-

incriminating answers, such as “did you review any documents,” *id.* at 26:18-21, and “Mr. Kelley, are you going to assert your Fifth Amendment right to every single question that I ask you?” *Id.* at 27:16-20. It quickly became evident that moving forward with the deposition would be futile.

In addition, at various points in the deposition, Mr. Bourque addressed Government counsel as “big boy,” *id.* at 16:34, 30:3-4, 39:10-12, and in one instance threatened him, saying “And you’re very fortunate you’re not in this room with me in person right now. You got that?” *Id.* at 30:12-16. When counsel for the United States asked if Mr. Bourque was threatening him, Mr. Bourque answered by saying, “Oh, please. Go--,” *id.* at 30:18-20, but he did not deny that he intended to intimidate and/or obstruct Government counsel’s examination of the witness.

Moreover, Mr. Jackson objected to the relevance of a question about the *Lookingbill* settlement, stated that the topic was “just harassing” and that he would end the deposition if that line of questions continued. *Id.* at 24:4-25. Based on the action of Michael Kelley and counsel, Government counsel concluded that taking the deposition of Rebecca Kelley, scheduled for that afternoon, was likely to lead to the same results, and informed Mr. Jackson and Mr. Bourque that Mrs. Kelley’s deposition would not go forward on that day.

Within one hour of the United States suspending Michael Kelley’s deposition, Daniel Horowitz, counsel for Danielle Smith (Devin Kelley’s widow), notified the United States via a letter sent electronically that his client insisted on immunity or otherwise would “plead the 5th.” This letter is almost identical to the letter sent out by Mr. Bourque with regard to the Kelleys. The United States sought clarification in an email, asking Mr. Horowitz “when you state that you will

instruct Danielle to plead the 5th, would that instruction be for all questions posed to Danielle?”

Mr. Horowitz’s response was: “Depends on the questions asked.” Due to the appearance of coordination between counsel, and in the interest of avoiding a waste of time and money, the United States chose to postpone Ms. Smith’s deposition until after a ruling is obtained from this Court.

ARGUMENT

I. Deposition Testimony Should be Compelled Because Deponents Have Not Demonstrated a Valid Basis to Invoke their Fifth Amendment Privilege.

The privilege against self-incrimination encoded in the Fifth Amendment has been broadly construed “to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.” *Maness v. Meyers*, 419 U.S. 449, 461 (1975). Accordingly, the privilege applies in civil actions as well as criminal actions. *See Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979). However, the privilege is not unlimited. Rather, “this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.” *Hoffman v. United States*, 341 U.S. 479 486. While a person may claim the privilege if he or she “reasonably apprehends a risk of self-incrimination[.]” *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087 n.5 (5th Cir. 1979), “[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.” *Id.* Accordingly, “unless the danger of self-incrimination is readily apparent, the burden of proving that the danger exists lies on the claimant.” *Steinbrecher v. Comm’r*, 712 F.2d 195, 198 (5th Cir. 1983).

Here, none of the Deponents have shown that self-incrimination is anything but a remote and speculative possibility. Deponents have not identified any ongoing criminal matter in which they are involved, and have not pointed to any specific crimes, much less federal violations, for which they could face criminal jeopardy. In their letters to Government counsel, the Deponents make a broad, generalized claim that “[a]ny acquaintances of the perpetrators would be investigated as targets for indictment.” (Ex. B). And, in the Kelleys’ motion to quash the subpoena for documents, they claimed “more than a trifling unease that the government may be seeking for someone, besides itself, to hold accountable.” (ECF No. 224 at 8). But the Deponents already have provided statements to the Texas Rangers and the Department of Defense Office of Inspector General several years earlier. Those statements have not led to any prosecutions of Devin Kelley’s acquaintances. The Deponents have not pointed to any statutes of limitations that have yet to elapse or statutes that grant federal jurisdiction over any criminal investigation. The Deponents’ pure speculation is an insufficient basis to assert their Fifth Amendment right against self-incrimination.

In any event, mere speculation does not shift the burden on the United States to demonstrate the steps it took to seek immunity for the Deponents. As counsel for the United States noted during the deposition, they can neither confirm nor deny the existence of a criminal investigation. (Ex. A at 14:12-14, 21:13-14.) Despite Mr. Bourque’s claims to the contrary, that standard Government response does not suggest that the deposition was used as a pretext to start building a criminal investigation. Such deceptive tactics are clearly prohibited. *United States v. Posada Carriles*, 541 F.3d 344, 356 (5th Cir. 2008) (reiterating deceptive tactics by government agency may not be used in civil investigation to solicit testimony to be later used in criminal investigation).

The United States' counsel have been forthright with the Court regarding its intention with respect to these depositions. (*See also* Ex. A at 16:21-17:1, statement by Mr. Handler: “[W]e are here in this deposition to depose Mr. Kelley with regard to the facts and circumstances of the allegations made by the plaintiffs in this civil litigation. That is my only intention in this case.”) The United States has identified Devin Kelley, not the Deponents, as a potential responsible third party. (ECF No. 150). Additionally, several of the Plaintiffs in these cases brought a civil action against the Kelleys and settled their suit for a thus-far undisclosed amount. Because the United States has the right to seek a credit against any other parties' settlement, Tex. Civ. Prac. & Rem. Code § 33.003(a)(3), questions of the Deponents regarding that settlement are certainly relevant.⁵ As articulated during the April 28, 2020, hearing, the Government seeks these depositions as a means to discovering Devin Kelley's propensity for violence and whether his heinous act was foreseeable. Such discovery is clearly relevant to the United States' defenses.

A court may compel testimony if “a deponent fails to answer a question asked under Rule 30 or 31[.]” Fed. R. Civ. P. 37(a)(3)(B)(i). As such, the Deponents should be compelled to answer questions unless and until they demonstrate a valid basis for asserting the Fifth Amendment privilege to a question. Therefore, the United States respectfully requests that the Court determine the extent to which the Deponents may invoke their Fifth Amendment right against self-incrimination, if at all, and provide a limiting instruction prior to the Deponent's depositions.

⁵ Moreover, the Court shall assign a percentage of responsibility to “each settling person” in a civil action in the event that there is evidence supporting such an assignment. Tex. Civ. Prac. & Rem. Code § 33.003(a)(3).

II. Even If There Were Any Validity to Deponents’ Fear of Self-Incrimination, Michael Kelley’s Blanket Assertion of the Fifth Amendment, and the Scope of His Counsel’s Objections, Were Inappropriate.

Even if Mr. Kelley could reasonably fear criminal prosecution based on his answers to some select questions, he abused the privilege to invoke the Fifth Amendment right against self-incrimination. When answering a deposition question, if “the incriminating nature of the response is not readily apparent . . . the claimant must ‘specify how he would be injured by any specific question [or answer]’” *Steinbrecher*, 712 F.2d at 198. Even where the testimony “may expose [the Deponents] to a small but real danger of prosecution,” the assertion must be tailored, and the deponent must “answer every question except those to which a truthful answer will realistically expose them to a danger of prosecution.” *Hillmann v. City of Chicago*, 918 F. Supp. 2d 775, 780 (N.D. Ill. 2013); *see Estate of Fisher v. Comm’r*, 905 F.2d 645, 649 (2d Cir. 1990). Accordingly, “[a] blanket refusal to answer questions at depositions on the grounds that they are privileged is an improper invocation of the Fifth Amendment.” *Gabarick v. Laurin Mar. (Am.) Inc.*, 274 F.R.D. 208, 211 (E.D. La. 2011) (quoting *First Financial Group of Texas* 659 F.2d at 668)); *see National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595, 599 (3d Cir.1980) (“[A] blanket refusal to answer questions is not sufficient to raise constitutional issues.”).

Here, Mr. Kelley invoked the privilege for questions that could have no possible relevance to any criminal prosecution, including “did you review any documents?” Ex. A at 26:18-21 and “Mr. Kelley, are you going to assert your Fifth Amendment right to every single question that I ask you?” *Id.* at 27:16-20. When asked about the settlement of the *Lookingbill* case, Mr. Kelley

asserted the Fifth as well.⁶ As such, the assertion here must be considered a blanket assertion of the privilege, and therefore improper. Improper objections along the same lines were also made by Plaintiffs' counsel. Plaintiffs' counsel objected to the deposition proceeding on a question-by-question basis and thus compounded the issue. *See* Ex. A at 17:14-24.

Knowing their client would invoke his Fifth Amendment privilege to every question, Mr. Kelley's attorneys should have filed a motion for a protective order or, at the least, raised the issue with Government counsel while the depositions were being scheduled in order to avoid this outcome. The May 14 letter did not state that the Kelleys would refuse to answer any questions if their demands were not met. The Kelleys' motion to quash did not mention the May 14 letter or raise the issue of requesting immunity. The United States addressed the Kelleys' fear of self-incrimination in its opposition to their motion to quash the subpoena for documents. When the parties conferred to discuss the motion, the Government specifically asked if Mr. Bourque needed to participate in the discussion. Mr. Jackson assured the Government that his presence was not necessary. Following that conference, the motion was withdrawn and this issue of self-incrimination or immunity was never raised again. Despite numerous correspondence regarding this deposition, Mr. Jackson did not inform the United States that his clients intended to invoke the privilege of the Fifth Amendment for every substantive question asked. Instead, counsel chose to present Mr. Kelley for his deposition.

Moreover, Mr. Kelley's counsel violated Local Rules by making inappropriate objections. Under Local Civil Rule 30(b), "If a claim of privilege has been asserted as a basis for an instruction not to answer, the attorney seeking discovery shall have reasonable latitude during the

⁶ In addition, Mr. Jackson implied that requiring an assertion of the Fifth Amendment privilege to individual questions would be harassment. Ex. A at 17:25-18:3.

deposition to question the deponent and establish relevant information concerning the appropriateness of the assertion of the privilege, including (i) the applicability of the privilege being asserted” The rules also provide that “[a]n attorney who instructs a deponent not to answer a question shall state, on the record, the legal basis for the instruction consistent with Federal Rule of Civil Procedure 30(d)(1).” *Id.*

When United States’ counsel attempted to ask the questions identified in Local Rule 30(b) – *i.e.*, establishing a record that captures the basis for the privilege assertion – Michael Kelley’s counsel repeatedly and inappropriately objected. Government counsel tried to get clarification from Mr. Jackson as to whether Mr. Kelley would invoke the Fifth Amendment to every question, but counsel refused to provide a meaningful response. Ex. A at 27:7-13; 28:19-29:7. These invocations are clearly improper and were used as a tactic to disrupt a judicial proceeding. The Local Rules were clearly violated here.

Additionally, Mr. Kelley’s counsel made inappropriate objections to questions regarding the *Lookingbill* settlement. His counsel contended that the questions with regard to the *Lookingbill* settlement were not relevant. Ex. A at 23:16-25. But, as explained above, that settlement is clearly relevant, and thus such objections were frivolous. Certainly, such objections were not a valid basis to instruct the witness to not answer questions.

III. Federal Rule of Civil Procedure 30(d)(2) Permits the Court to Impose Sanctions.

Courts may “impose an appropriate sanction--including the reasonable expenses and attorney’s fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.” Fed. R. Civ. P. 30(d)(2). The sanction of Rule 30(d)(2) “may be imposed on a non-party witness as well as a party or attorney.” Fed. R. Civ. P. 30(d) Advisory Committee Notes, 1993 amendments; *see also* 28 U.S.C. § 1927 (“Any attorney . . . who so

multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.”). “Many courts have construed Rule 30(d)(2) to apply to circumstances where a party’s conduct at a deposition warranted remedial action.” *S. Louisiana Ethanol, L.L.C. v. Fireman's Fund Ins. Co.*, No. CIV.A. 11-2715, 2013 WL 1196604, at *8 (E.D. La. Mar. 22, 2013) (citing cases involving “improperly instructing deponent not to answer” and “numerous objections to deposition questions”).

As this Court’s rules recognize, a “lawyer’s role is to zealously advance the legitimate interests of the client, while maintaining appropriate standards of civility and decorum.” Local Attorney Rule 4(d). Indeed, [a] lawyer should treat all other lawyers, all parties, and all witnesses courteously, not only in court, but also in other written and oral communication.” *Id.*; see *Dondi Properties Corp. v. Commerce Sav. & Loan Ass’n*, 121 F.R.D. 284, 287 (N.D. Tex. 1988) (noting that “[a] lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves”). With respect to depositions specifically, “[o]bjections during depositions shall be stated concisely and in a nonargumentative and nonsuggestive manner.” Local Civil Rule 30(b).

Mr. Kelley’s counsel abused and disrespected the judicial proceeding by using an inappropriate term to refer to United States counsel and by warning government counsel that he was lucky they were not in the same room. The United States therefore respectfully submits that the conduct of Mr. Kelley’s attorneys, Gerald E. Bourque, Esq. and J. Dean Jackson, Esq., was inappropriate and sanctionable.

CONCLUSION

For the reasons stated and upon the authorities cited, the United States respectfully requests this Court to grant its Motion to Compel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 1, 2020, I electronically filed the foregoing with the clerk of court by using the CM/ECF system. Additionally, I sent copies of the motion via email to the following attorneys:

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Exhibit A

In the Matter Of:

HOLCOMBE vs UNITED STATES of AMERICA

5:18-CV-00555-XR

MICHAEL SHAWN KELLEY

June 23, 2020



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DEPOSITION SOLUTIONS

800.211.DEPO (3376)
EsquireSolutions.com

MICHAEL SHAWN KELLEY
HOLCOMBE vs UNITED STATES of AMERICA

June 23, 2020

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOE HOLCOMBE, ET AL., §
 §
 PLAINTIFF, § CIVIL ACTION NO.
 § 5:18-CV-00555-XR
V. §
 §
UNITED STATES OF AMERICA, §
 §
 DEFENDANT. §

REMOTE DEPOSITION OF MICHAEL SHAWN KELLEY
JUNE 23, 2020

REMOTE DEPOSITION OF MICHAEL SHAWN KELLEY,
produced as a witness at the instance of the
Defendant and duly sworn, was taken in the above
styled and numbered cause on Tuesday, June 23, 2020,
from 8:17 a.m. to 9:23 a.m., before TAMARA CHAPMAN,
CSR, RPR-CRR in and for the State of Texas, reported
remotely by computerized stenotype machine in
Austin, Texas pursuant to the Federal Rules of Civil
Procedure and any provisions stated on the record
herein.

Job No. J5731874

MICHAEL SHAWN KELLEY
HOLCOMBE vs UNITED STATES of AMERICA

June 23, 2020

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MICHAEL SHAWN KELLEY
HOLCOMBE vs UNITED STATES of AMERICA

June 23, 2020

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MICHAEL SHAWN KELLEY
HOLCOMBE vs UNITED STATES of AMERICA

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2 Exhibit 8, 7 3
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3 (TXRANGERS00047011)

4 Exhibit 9, 7 3

5 Texas Department of Public Safety,
Texas Rangers, Supplemental report by
Billy Mims

6 (TXRANGERS00053617 -

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7 Exhibit 10, 7 3

8 Video clip

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10 Exhibit 11, 7 3

11 Texas Department of Public Safety,

12 Texas Rangers, Supplemental report by
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13 (TXRANGERS00053663 -

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15 Exhibit 12, 7 3

16 Audio clip

17 (TXRANGERS00016657)

18 Exhibit 13, 7 3

19 Texas Department of Public Safety,

20 Texas Rangers, Supplemental report by

21 Joseph Evans

22 (TXRANGERS00049390 -

23 TXRANGERS00049391)

24

25



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1 THE STENOGRAPHER: Pursuant to the
2 First Emergency Order Regarding the COVID-19
3 State of Disaster, Paragraphs 2.b. and 2.c., this
4 deposition of Michael Kelley is being conducted
5 remotely via Zoom. Today's date is June 23, 2020
6 and the time is 8:17 a.m.

7 My name is Tamara Chapman, Texas
8 CSR #7248. I am administering the oath and
9 reporting the deposition remotely by stenographic
10 means from my residence within the State of
11 Texas.

12 MR. HANDLER: Steve Handler
13 representing the United States.

14 MR. SCHREIBER: This is Joseph
15 Schreiber. I represent the plaintiffs.

16 MR. JACKSON: Dean Jackson. It's
17 my privilege and honor to represent Michael and
18 Rebecca Kelley. I'm here along with Gerald
19 Bourque, who is their personal counsel as well.

20 MR. ALSAFFAR: Jamal Alsaffar,
21 representing the plaintiffs.

22 MR. STERN: Paul Stern on behalf
23 of defendant, United States.

24 MR. FURMAN: Austin Furman,
25 defending the United States.

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1 MR. WEBSTER: Jason Webster,
2 representing plaintiffs.

3 MICHAEL SHAWN KELLEY,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 BY MR. HANDLER:

7 Q. Good morning, Mr. Kelley. My name is
8 Steven Handler. I represent the United States.

9 For the record, could you please state
10 your full name and spell it for the record.

11 A. Michael Shawn Kelley. Michael,
12 M-I-C-H-A-E-L; Shawn, S-H-A-W-N; Kelley, K-E-L-L-E-Y.

13 Q. Thank you. Well, let the record reflect
14 that this is the deposition of Michael Kelley taken
15 pursuant to notice in accordance with the Federal
16 Rules of Civil Procedure and the local rules of the
17 Western District of Texas.

18 As I said, I'm representing the United
19 States. Are you represented by counsel today?

20 A. Yes.

21 Q. And can you name your counsel, please?

22 A. Dean Jackson and Gerald Bourque.

23 Q. Okay. Now, there are other attorneys
24 attending this deposition and they represent, of
25 course you heard, the plaintiffs and the United

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1 States.

2 We're here today to discover facts
3 regarding the allegations that the plaintiffs have
4 made against the United States, as well as other
5 related matters. In particular, this lawsuit
6 pertains to the wrongful death and personal injury
7 actions brought against the United States.

8 The claims arise out of a mass shooting
9 perpetrated by former Airman Devin Patrick Kelley at
10 the First Baptist Church in Sutherland Springs,
11 Texas, on Sunday, November 5th, 2017.

12 Mr. Kelley, throughout this deposition,
13 instead of me repeating the full names of everyone,
14 I'll probably use shorthand references. So the First
15 Baptist Church of Sutherland Springs, we'll just call
16 it "the church." The shooting perpetrated by Airman
17 Devin Patrick Kelley will be called "the church
18 shooting" or just "the shooting." Whenever I
19 reference Devin Patrick Kelley, I'll probably just
20 call him by his first name, Devin. I'll also mention
21 Danielle Kelley. I'll just call her Danielle.
22 That's Devin's second wife. Tessa Kelley, Devin's
23 first wife, we'll just call her Tessa. Michelle
24 Shields, the mother of Danielle, we'll just call her
25 Michelle.

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1 And to the extent possible I'll try to use
2 the first names, just to move the deposition along.

3 Are you presently taking any medications
4 or are you on any medications that would impair your
5 ability to understand my questions and give
6 appropriate answers?

7 A. No.

8 Q. Have you ever had your deposition taken
9 before in a setting like this? Not necessarily on
10 Zoom, but maybe even in person?

11 A. Yes, once.

12 Q. And when was that?

13 A. Back in the '80s. I don't remember when.

14 Q. Was it a civil case or criminal case?

15 A. Civil.

16 Q. Okay. And were you the plaintiff or the
17 defendant?

18 A. I was the defendant.

19 Q. Okay. And what did the -- what was the --
20 the gist of the case?

21 A. We had some carpenter guys over building a
22 deck and they cut their fingers on their saw.

23 Q. I'm sorry. Could you repeat that?

24 A. I said we had some guys over, carpenters,
25 building a deck and they cut their fingers with their

1 saw.

2 (Discussion off the written record.)

3 Q. And, Mr. Kelley, other than that one
4 deposition back in the '80s, have you ever been
5 deposed, other than that one time?

6 A. No.

7 Q. Okay. So a deposition is just like
8 testifying in court under oath before a judge. The
9 court reporter will record all of your questions --
10 all the questions and all of the answers. I'll be
11 asking you questions. Other attorneys may be asking
12 you questions. And some of the attorneys may object,
13 but you can still respond, unless your attorney
14 instructs you not to.

15 Because you're sworn under oath, you are
16 expected to respond to the questions to the best of
17 your knowledge, but your responses must be truthful.
18 Your response is subject to the penalty of perjury if
19 your response is not truthful regarding any material
20 facts.

21 If at any time I ask you a question and
22 you do not understand it, please stop me so I can
23 rephrase it or ask a different question. If you
24 respond to a question, I will conclude that you
25 understood it and you were giving an appropriate

1 response.

2 All of your responses must be verbal in
3 order for the court reporter to record them. You
4 can't nod your head or shake your head or gesture
5 with your hands.

6 At the end of deposition, when a
7 transcript is prepared, you will be given the
8 opportunity to read it and make corrections. To the
9 extent, however, you make any substantive
10 corrections, we may have to take your deposition
11 again.

12 Before we get started, do you understand
13 all my instructions?

14 A. Yes.

15 Q. Okay. Do you have any questions?

16 A. No.

17 Q. Okay. Now, you mentioned before that you
18 were a defendant in a certain -- in the 1980s.

19 Are you presently or had you been a
20 defendant with respect to the litigation involving
21 the shooting at the church?

22 MR. BOURQUE: No. Before we go
23 any further, let me -- there is something I want
24 to take up, and I want to take up Kelley 1 with
25 the government at this time. If you'll pop that

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1 up so the government can see.

2 On May the 14th of this year I
3 sent a letter to the Western District of Texas to
4 the attention of Paul David Stern. I sent it by
5 regular mail and I emailed. Copies went to
6 Mr. Alsaffar and Mr. Jackson. I never got a
7 return envelope saying that the letter was not
8 received.

9 I also neither got a response to
10 that letter from the United States Government or
11 from Mr. Stern. I also never got so much as a
12 phone call from Mr. Stern or anyone with the
13 government involved in this case. I had no
14 acknowledgement at all that I even existed in
15 this case, from the government.

16 In my letter I set out what I
17 needed from the government before this deposition
18 was to take place. I never received any
19 statement given by Mr. Kelley. I never received
20 any statements that were given by Ms. Kelley to
21 any of the people listed in that letter.

22 I also set out why I'm concerned
23 about this deposition going forward. This is a
24 mass homicide. The perpetrator of this event
25 either committed suicide or was killed by others.

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1 The only remaining possible targets are
2 Mr. Kelley and Ms. Kelley.

3 I asked in my letter, please give
4 me some reassurance. This is what criminal
5 defense lawyers who have tried 12 to 14 capital
6 murder death penalty cases do. They seek from
7 the government some assurance that says, "you
8 know, it's been two and a half years. What's the
9 status of a grand jury impanelling? Are my
10 clients targets now or are they ever going to be
11 targets?"

12 I got not one single solitary
13 response, not even a phone call that says, "It's
14 out of my hands. I don't make that call." So I
15 can only assume that there is a sinister reason
16 for you not contacting me or the government not
17 making an effort to seek immunity so that these
18 two people can give truthful answers to truthful
19 questions.

20 So I have a serious concern about
21 the government's good-faith intentions in this
22 deposition. And I want somebody to tell me,
23 whether it's Mr. Handler or it's Mr. Stern, what
24 efforts you made to seek immunity or to answer my
25 questions in response to my May 14th, 2020,

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1 letter.

2 MR. JACKSON: Did you introduce it
3 already?

4 MR. BOURQUE: And if it hadn't
5 been introduced for purposes of the deposition,
6 I'm introducing it now for the purposes of the
7 deposition.

8 MR. HANDLER: Mr. Bourque, is that
9 it?

10 MR. BOURQUE: I answer to pretty
11 much anything. That will work.

12 MR. HANDLER: Okay. I can neither
13 confirm nor deny the existence of any criminal
14 investigation.

15 MR. BOURQUE: You know what the
16 problem is -- whatever --

17 MR. HANDLER: Let me finish. Let
18 me finish. Excuse me.

19 I said I can neither confirm nor
20 deny the existence of any criminal investigation.
21 This is a discovery deposition, the third-party
22 witness in a civil case. We have issued a
23 subpoena. He's appearing and we have the right
24 to take his deposition. I have not --

25 MR. BOURQUE: He has rights also.

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1 MR. HANDLER: Well, I understand
2 that, but are you saying that if we don't give
3 you the assurances you requested in your letter,
4 that you're going to instruct your witness not to
5 respond to any questions in this deposition?

6 MR. BOURQUE: Let me ask you this.
7 What efforts did you make to comply with anything
8 I sent on May the 14th, 2020? That's my question
9 and it deserves an answer.

10 MR. HANDLER: Let me just say,
11 Mr. Bourque, I am not the witness in this case.
12 The witness in this case is Mr. Kelley, and he is
13 the one that I'm posing questions to, and he is
14 the one that I will ask -- you know, that is the
15 deponent.

16 I am not here to answer your
17 questions, and I'm asking you, are you going to
18 instruct your witness not to answer the questions
19 and participate as a deponent in this civil
20 lawsuit because your letter -- the questions in
21 your letter were not responded to? A simple
22 question, "yes" or "no"?

23 MR. BOURQUE: I don't give
24 yes-or-no answers until I get answers to my
25 questions.

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1 MR. HANDLER: Well, I'm not giving
2 you an answer to your question.

3 MR. BOURQUE: Okay. Well, then
4 I'm not giving you an answer to yours, big boy.

5 MR. JACKSON: Mr. Handler, this is
6 Gerald's issue with this. You didn't respond to
7 his letter. He has some serious questions about
8 your motives behind this deposition. We
9 understand it's a civil lawsuit.

10 However, by not responding to his
11 letter, he is assuming that you guys are going to
12 try to indict Mr. and Ms. Kelley, and you're
13 going to take this deposition, you're going to
14 run it over to the other side of the street and
15 say "here you go, we did your work for you."

16 I mean, it's pretty easy. And
17 what you're making the Kelleys do right now is
18 not answer your questions and possibly invoke
19 their Fifth Amendment right to make it look
20 terrible on them.

21 MR. HANDLER: I have already made
22 a statement that we are here in this deposition
23 to depose Mr. Kelley with regard to the facts and
24 circumstances of the allegations made by the
25 plaintiffs in this civil litigation. That is my

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1 only intention in this case. And I did -- I made
2 that statement.

3 MR. JACKSON: That right there is
4 saying something without saying anything.

5 MR. HANDLER: I'm sorry?

6 MR. JACKSON: That is saying
7 nothing. I mean, just using words out loud that
8 mean nothing.

9 MR. HANDLER: Well, I'm going to
10 proceed with this deposition. If you're going to
11 instruct your witness not to answer, you're going
12 to have to do it question by question.

13 Okay? So let's proceed.

14 MR. SCHREIBER: I'd like to make a
15 statement on behalf of the plaintiffs in the
16 civil side of the case.

17 We object to a question-by-question.
18 Fifth Amendment -- questions by the government
19 seeking to have the witness invoke the Fifth
20 Amendment, when for over a month you guys have
21 had a letter letting you know this was going to
22 happen. So we object to any sort of spectacle
23 which might make the witness look bad and might
24 try and take a side-shot at the plaintiffs.

25 MR. JACKSON: Right. And I will

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1 shut this deposition down if we go question by
2 question just to intimidate and harass my
3 clients.

4 MR. STERN: Can I jump in for a
5 second. This is Paul Stern.

6 Mr. Schreiber, I realize that
7 Mr. Handler is taking the deposition.
8 Nonetheless, the letter was intended and was
9 addressed to me, sir, and to the extent that this
10 issue has been raised and addressed to lead
11 counsel, I would like the opportunity to respond.

12 MR. SCHREIBER: Okay. Go ahead.

13 MR. STERN: Thank you.

14 As you're well aware, we sought
15 the deposition of Michael and Rebecca Kelley
16 during a court hearing on May 14th, 2019. Judge
17 Rodriguez authorized those depositions to be
18 taken. Prior to seeking these depositions, we
19 sent a request for a subpoena to produce
20 documents. That subpoena was responded to with a
21 motion for a protective order. A motion for
22 protective order addressed various issues without
23 raising the -- including the issue of potential
24 assertions of Fifth Amendment.

25 We then had a conversation with

1 Dean Jackson to try to obviate the need to
2 litigate the matter any further. After we
3 responded to that motion, at that time
4 Mr. Jackson agreed to withdraw the motion for
5 protective order and agreed to schedule this
6 deposition.

7 At the -- subsequent to that
8 conversation, we then had conversations about the
9 logistics of scheduling this deposition, and then
10 subpoenaed Michael and Rebecca Kelley to appear
11 for their deposition per the court order. At no
12 time was the issue raised about that letter and
13 the reassertion of any Fifth Amendment concerns.

14 We fully recognize that this is a
15 civil litigation where we've identified Devin
16 Patrick Kelley as a potential responsible third
17 party. The Court granted that authorization, as
18 well granted these depositions to be taken. Note
19 we are -- this deposition is being taken without
20 any outstanding protective order in place; and to
21 the extent that you're now insisting that we
22 respond to the letter, we've had conversations
23 with Dean Jackson but in no way are obligated to
24 reveal how we determined whether or not and to
25 what extent we should respond to that letter.

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1 These depositions are going
2 forward without a protective order in place.
3 Questions will be asked, and if the deponent
4 answers by asserting his Fifth Amendment right
5 against self-incrimination, so be it, but we have
6 a right to take this deposition and will continue
7 to do so.

8 MR. BOURQUE: All right. I
9 appreciate that, Mr. Stern.

10 One more response from Gerald
11 Bourque. Since you volunteered to jump in to
12 this, I'd like to hear from you. What effort did
13 you make to determine whether or not Mr. and
14 Ms. Kelley are now targets of the United States
15 Government or are not targets of the United
16 States Government?

17 MR. STERN: I am not responding to
18 your questions. I'm responding to your
19 accusations that we are taking this deposition in
20 an inappropriate manner. That is not the case.
21 We scheduled it with counsel with no outstanding
22 protective order in place and this deposition
23 will go forward.

24 MR. BOURQUE: Well, that's
25 wonderful, Mr. Stern. I so much appreciate

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1 your -- your inclination here. Can you just
2 answer my question? What efforts did you put in
3 to this? I take it by your silence, none. You
4 did nothing. You didn't do anything.
5 Mr. Handler didn't do anything. No one from the
6 United States Government so much as made an
7 effort to walk across the hall and talk to
8 United -

9 (Simultaneous speaking.)

10 MR. STERN: Mr. Bourque, we are --

11 MR. BOURQUE: I'm assuming -- if
12 I'm wrong --

13 MR. STERN: We neither confirming
14 or denying any investigation. We are not going
15 to reveal attorney work product regarding this --
16 this case. If you're going to remove your
17 witness, do so, but, otherwise, we are going to
18 continue with this deposition --

19 MR. BOURKE: Get on with it.

20 (Simultaneous speaking.)

21 MR. STERN: -- asking the
22 questions.

23 Mr. Handler, please proceed.

24 MR. BOURQUE: Why don't you try to
25 get on with it. Get on with it. Okay? Get on

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1 with it. I got my answers. You did nothing.

2 Q. Mr. Kelley, I apologize for the discourse
3 here. Attorneys do that in depositions, but we'll
4 proceed.

5 Now, with regard to this particular
6 litigation, the -- involving the church shooting,
7 were you a defendant in a case called Lookingbill?

8 A. On advice of my counsel, I assert my Fifth
9 Amendment right to remain silent.

10 MR. WEBSTER: And I'm going to object to
11 the continued line of -- this is Jason Webster. I'm
12 going to object to the continued line of questioning
13 if he's going to invoke the Fifth Amendment because
14 it's not admissible in federal court. So if he's
15 going to continue to answer every single question,
16 it's not admissible. So we need to go get a ruling
17 by the judge and then come back.

18 MR. HANDLER: Mr. Webster, I think
19 you're incorrect, but we will continue.

20 Q. Mr. Kelley, you've asserted your Fifth
21 Amendment right to remain silent regarding whether or
22 not you are a defendant in Lookingbill case. Is that
23 correct?

24 MR. JACKSON: Objection; asked and
25 answered --

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1 A. By advice of counsel, I assert my Fifth
2 Amendment right to remain silent.

3 Q. Okay. Are you going to follow that
4 advice?

5 A. On advice of my counsel, I'm going to
6 assert my Fifth Amendment right to remain silent.

7 Q. Okay. Was that -- was the Lookingbill
8 case settled on your behalf?

9 A. On advice of my counsel, I'm going to
10 assert -- I assert my Fifth Amendment right to remain
11 silent.

12 Q. And did you pay any money with regard to
13 that lawsuit?

14 A. On advice of my counsel, I assert my Fifth
15 Amendment right to remain silent.

16 MR. HANDLER: Counsel, what is the
17 basis for asserting the Fifth Amendment right
18 on -- on information that concerns a pending
19 lawsuit in a state court action?

20 MR. JACKSON: And I'm also going
21 to object as completely irrelevant, so anything
22 that's happening in the federal lawsuit against
23 the United States Government.

24 Mr. Handler, that makes -- the
25 relevancy of that is -- I can't even comprehend

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1 in the great sea of imagination how that would
2 have any relevance in the plaintiff's lawsuit
3 against the United States Government. So I'm
4 going to object -- I mean, quite frankly, that's
5 just harassing and it has no relevance whatsoever
6 to the United States --

7 (Simultaneous speaking.)

8 MR. HANDLER: It is not
9 harassment. It pertains to monies that are spent
10 by defendant in a state case that may be offset
11 in the federal case and has similar allegations.
12 That's not irrelevant and that's not a basis for
13 asserting the Fifth Amendment. The Fifth
14 Amendment has a very particular assertion here.
15 Are you saying that your client is asserting the
16 Fifth Amendment based on relevancy? State the
17 basis, Counsel.

18 MR. JACKSON: I'm saying, as the
19 civil counsel for Mr. and Ms. Kelley, that that
20 is -- I mean, I can't even fathom how that would
21 be particularly relevant. And if this line of
22 questioning keeps coming up, Mr. Handler, I think
23 we need to stop this deposition. We'll just take
24 it up in front of Mr. -- in front of Judge
25 Rodriguez. And we can do it in the courthouse.

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1 MR. HANDLER: And I think you're
2 being obstructionist here because this is valid,
3 you know, questions regarding, you know,
4 information that United States needs to defend
5 its lawsuit. And you are being obstructionist
6 here. And I -- I strongly suggest that you ask
7 your client to answer these questions.

8 MR. JACKSON: Mr. Handler, how --

9 MR. SCHREIBER: Sidebar.

10 MR. JACKSON: -- the world is that
11 even relevant to -- to the allegations that the
12 plaintiffs made against the United States
13 Government? How?

14 MR. HANDLER: Let me explain it to
15 you. It has to do with offset. If he paid money
16 for Lookingbill in the state case, then with
17 regard to the federal case, Lookingbill would be
18 getting an offset for that. And that is relevant
19 and that's not -- you know, that is information
20 that we can -- that the United States can argue
21 with the plaintiffs at a later time, but right
22 now, I'm gathering facts regarding the amount of
23 money that Mr. Kelley paid with regard to
24 Lookingbill. And if I have to bring this -- the
25 witness back, this cost is going to be on you,

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1 Counsel.

2 Q. So do you have the documents pertaining to
3 the settlement of the Lookingbill case, Mr. Kelley?

4 A. On advice of counsel, I assert my Fifth
5 Amendment right to remain silent.

6 Q. Okay. Let's move on.

7 Are you assisting any of the plaintiffs in
8 this litigation?

9 MR. SCHREIBER: Objection; vague.

10 MR. JACKSON: Objection; vague.

11 A. On advice of counsel, I assert my Fifth
12 Amendment right to remain silent.

13 MR. SCHREIBER: Vague. Objection.

14 This is Mr. Schreiber. I made a
15 vague objection to -- to the question.

16 MR. JACKSON: And Dean Jackson did
17 as well.

18 Q. Mr. Kelley, preparation for this
19 deposition, did you review any documents?

20 A. On advice of counsel, I assert my Fifth
21 Amendment right to remain silent.

22 Q. In preparation for this deposition, did
23 you talk to anyone other than your attorneys in
24 preparation for this deposition?

25 A. On advice of counsel, I assert my Fifth

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1 Amendment right to remain silent.

2 Q. Okay.

3 MR. STERN: Steven, this is Paul
4 Stern again. Could we perhaps maybe take a
5 five-minute break? Everyone, I think we just
6 need to take a quick five minutes.

7 MR. HANDLER: Let me ask you a
8 quick question.

9 Mr. Jackson, is your client going
10 to assert the Fifth Amendment right to every
11 single question that I ask?

12 MR. JACKSON: That should not be
13 addressed to me.

14 MR. HANDLER: I'm asking you.
15 Okay. We'll ask Mr. Kelley.

16 Q. Mr. Kelley, are you going to assert your
17 Fifth Amendment right to every single question that I
18 ask you?

19 A. On advice of counsel, I assert my Fifth
20 Amendment right to remain silent.

21 Q. Mr. Kelley, I understand you're asserting
22 your Fifth Amendment right, but I have a lot of
23 questions here, and we can be here for the next seven
24 hours of me asking you questions.

25 Are you going to assert your Fifth

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1 Amendment right to every single question that I ask
2 you?

3 A. On the advice of counsel, I assert my
4 Fifth Amendment right to remain silent.

5 MR. HANDLER: Court reporter,
6 let's take a five-minute break.

7 (Break.)

8 Q. Mr. Kelley, are you ready?

9 A. Yes.

10 Q. Okay. Mr. Kelley, I just want to be very
11 clear here. Are you planning to assert the Fifth
12 Amendment right against self-incrimination as to
13 every single question I ask in this deposition?

14 MR. BOURQUE: Objection; asked and
15 answered.

16 Q. Mr. Kelley, can you answer the question?

17 A. On advice of counsel, I assert my Fifth
18 Amendment right to remain silent.

19 MR. HANDLER: Mr. Jackson, I'm
20 posing this question to you. Are you going to
21 instruct your witness to assert the Fifth to
22 every single question that I ask in this
23 deposition?

24 MR. JACKSON: Listen, Mr. Handler,
25 I know exactly what you're doing. You're not

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1 going to get -- you're not going to bait me into
2 that. You need to ask your questions. And if
3 the question is appropriate, then we'll answer
4 it. If not, then his private counsel is going to
5 instruct him as he -- as he deems appropriate.
6 You're not going to bait me into that. I've been
7 doing this too long.

8 MR. HANDLER: So are you saying
9 that you're going to allow this witness to answer
10 questions and not assert the Fifth --

11 MR. BOURQUE: Mr. Jackson is --

12 MR. HANDLER: -- depending on the
13 question?

14 MR. BOURQUE: Mr. Jackson is not
15 the witness. Ask your question.

16 MR. HANDLER: Well, based on that,
17 it seems to me that we're going to go question by
18 question and Mr. Kelley is going to have to
19 either answer the question or plead the Fifth.

20 (Simultaneous speaking.)

21 MR. BOURQUE: Ask your question.

22 MR. HANDLER: Okay. All right.
23 Let's proceed.

24 MR. BOURQUE: Oh, thank you. I
25 said that 20 minutes ago.

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1 MR. HANDLER: You know, you don't
2 have to be rude.

3 MR. BOURQUE: Oh, sure I do. You
4 didn't respond to my letter, big boy. Okay? You
5 treated me like a nonentity, and you're going to
6 tell me I'm not allowed to be rude? Call
7 somebody --

8 (Simultaneous speaking.)

9 MR. HANDLER: Yes, I am telling
10 you: Don't be rude. I'm not rude. Don't be
11 rude.

12 MR. BOURQUE: I have every right
13 to treat you the way you treated me. You get
14 that? And you're very fortunate you're not in
15 this room with me in person right now. You got
16 that? And you should have been --

17 (Simultaneous speaking.)

18 MR. HANDLER: Are you threatening
19 me? Are you threatening me?

20 MR. BOURQUE: Oh, please. Go --

21 (Simultaneous speaking.)

22 MR. HANDLER: Counsel, why don't
23 you be quiet and sit down and not obstruct this
24 witness from answering my questions.

25 MR. BOURQUE: Why don't you ask

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1 your questions that we stopped 30 minutes ago.
2 Or come -- I'm inviting you personally to come to
3 our conference room and you can do it in person.

4 MR. JACKSON: Mr. Handler, if you
5 want to ask some questions, go ahead.

6 Q. Mr. Kelley, with regard to documents that
7 you reviewed, did you review anything such as papers
8 or locations? Did you go to the church before your
9 deposition today?

10 A. On advice of counsel, I assert my Fifth
11 Amendment right to remain silent.

12 MR. HANDLER: I'm going to make a
13 statement for the record. I'm going to stop the
14 deposition, but I'm going to keep it open. I
15 believe that Mr. Kelley is inappropriately
16 asserting the Fifth Amendment privilege against
17 self-incrimination to appropriate questions for
18 this civil litigation.

19 We are going to leave it open,
20 though, and we're going to seek relief through
21 the Court.

22 And I want to ask counsel for
23 Mr. Kelley. We have Rebecca's deposition
24 scheduled for 2 o'clock today. Is Rebecca going
25 to assert the Fifth in the same manner that her

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1 husband Michael is going to assert the Fifth?

2 MR. BOURQUE: Ms. Kelley is here,
3 too.

4 MR. JACKSON: Mr. Handler, if you
5 wanted a fruitful deposition, and an honest
6 deposition, you could have answered Mr. Bourque's
7 letter and you could have asked Mr. Kelley the
8 questions and we would not be going through this
9 right now.

10 However, because of y'all's
11 ineptitude and refusal to answer Mr. Bourque's
12 letter, you've put him in a position and given
13 him no other alternative but to answer your
14 questions the way that he is.

15 MR. SCHREIBER: This is Joseph
16 Schreiber. I'd like to make a statement on
17 behalf of the plaintiffs, and the statement is
18 this. The plaintiffs state that the government,
19 by refusing to admit or deny that they're making
20 an investigation and charging Mr. and Ms. Kelley,
21 and/or at this point Danielle Kelley, after the
22 government's history of prosecuting the family
23 members of shooters like the Pulse nightclub has
24 put the Kelleys in the situation where they have
25 to assert the Fifth Amendment.

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1 The plaintiffs on this case would
2 like to ask the Kelleys questions. We think that
3 there is information. We understand they cannot
4 answer questions because the government is
5 weaponizing their ability to charge the Kelleys
6 criminally, and therefore the government, by
7 refusing to either confirm or deny, is
8 essentially obstructing our questioning as well.

9 And we object to any inference
10 that may or may not be sought by the government
11 when they've created the situation by refusing to
12 either -- to deny officially that there is an
13 investigation into the Kelleys, or grant an
14 immunity to testify so they won't be charged.

15 MR. JACKSON: Also, on the record
16 I want to say -- this is Dean Jackson -- I want
17 to state that I will also be seeking relief from
18 the court, as well as attorney's fees for the
19 abject refusal of the U.S. Government to reply to
20 Mr. Bourque's letter and creating the situation
21 that puts the Kelleys in a situation that they
22 are forced to assert their Fifth Amendment
23 privilege.

24 MR. HANDLER: Again, Mr. Jackson,
25 my question still stands. In order to resolve

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1 this right now --

2 (Simultaneous speaking.)

3 MR. BOURQUE: How does that work
4 for you? The government's ploy is to neither
5 admit or deny.

6 MR. HANDLER: Mr. Bourque, please
7 let me finish my statement. I asked the
8 question, we have Rebecca's deposition at
9 2 o'clock. Is she going to respond like Michael
10 and plead the Fifth to every question that we ask
11 her regarding this matter? Is she going to do
12 that? So we don't have to notice her -- take her
13 deposition and ask those --

14 MR. BOURQUE: Asked and answered.

15 MR. HANDLER: I didn't hear your
16 answer. Can you please repeat it.

17 MR. BOURQUE: You'll have to get
18 the court reporter.

19 MR. HANDLER: Read back the
20 answer.

21 (The requested material was read.)

22 THE STENOGRAPHER: "Ms. Kelley is
23 here."

24 MR. HANDLER: I can't get an
25 answer.

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1 MR. BOURQUE: That is the only
2 answer you're going to get.

3 MR. HANDLER: I consider that we
4 have met or satisfied our meet and confer with
5 regard to seeking relief before the Court, and we
6 will seek relief for the Court and we will ask
7 the Court to provide us with an opportunity to
8 re-depose Mr. Kelley and Ms. Kelley at an
9 appropriate time. Anybody else have any --

10 MR. BOURQUE: Please --

11 MR. HANDLER: Anyone else have a
12 statement for the record?

13 MR. BOURQUE: Yes, I do. Gerald
14 Bourque. To the government, either Mr. Handler
15 or Mr. Stern or whatever other government
16 employees involved in this case. Please bring
17 your grant of immunity with you when you seek
18 your relief for Mr. Kelley and Ms. Kelley. That
19 concludes my statement.

20 MR. SCHREIBER: I have nothing
21 further for the plaintiff.

22 MR. HANDLER: Anyone else?

23 MR. JACKSON: While we're on the
24 record, Mr. Handler, are you saying that you're
25 releasing Ms. Kelley from her subpoena?

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1 MR. HANDLER: No. All of the
2 subpoenas, the depositions remain open and
3 pending. I'm not releasing anyone from anything
4 until the Court rules.

5 MR. JACKSON: I'm talking about
6 2 o'clock today.

7 MR. HANDLER: She does not need to
8 appear for 2 o'clock, but she's still under the
9 subpoena.

10 MR. BOURQUE: The subpoena is --

11 MR. HANDLER: Anyone else?

12 MR. JACKSON: The subpoena for
13 2 o'clock. That makes no sense. You have to
14 reissue the subpoena.

15 MR. STERN: I think the idea of
16 going forward with Rebecca Kelley is obviously
17 futile, and so let's just queue this up for the
18 court. And to the extent we would need to
19 reissue a subpoena for Rebecca at a later date,
20 we would do so.

21 MR. BOURQUE: So you're not doing
22 the deposition at 2 o'clock for Ms. Kelley?

23 MR. STERN: Yes, to the extent
24 that we anticipate that she would provide similar
25 non-testimony the way Mr. Kelley is right now.

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1 That is correct.

2 MR. BOUCKE: Well, then I'm
3 assuming that the 2 o'clock depo for Ms. Kelley
4 is off.

5 MR. HANDLER: Understood.

6 MR. BOUCKE: Very good. Thank
7 you.

8 MR. SCHREIBER: This is Joseph
9 Schreiber. The plaintiffs would object to -- let
10 me back up.

11 Prior to the deposition a number
12 of exhibits were uploaded to the Zoom chat for
13 Esquire, including the first one, Kelley 1,
14 uploaded by Mr. Jackson, who is Michael Kelley's
15 personal attorney, which was actually discussed
16 in the deposition.

17 Mr. Handler for the government
18 uploaded -- I believe was it 13 documents that he
19 intended to use in the deposition but did not get
20 a chance to use because the deposition was
21 suspended. And so the plaintiffs object to the
22 13 documents that Mr. Handler uploaded being
23 attached to the deposition because they weren't
24 used with the witness at all.

25 To the extent that he needs to

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1 show them to the judge is what he was going to
2 ask, we don't have any objection to those because
3 we have a record of what they were being attached
4 to it a different motion. But I don't think they
5 belong on the transcript itself because they
6 weren't used to ask a witness a question.

7 Again, I don't -- we have a record
8 of what they were, Steven, and I don't have any
9 problem with you attaching them to a motion for
10 the judge and saying these are the ones I was
11 going -- what I was going to use. And I have a
12 record of which ones you have. I downloaded them
13 all. So I get it.

14 MR. HANDLER: I understand.

15 MR. BOURQUE: This is Gerald
16 Bourque. Let me add one final thing, if that's
17 all right.

18 Mr. Kelley was present for the
19 deposition, was seated, sworn, and as of about
20 9:15 Houston time, which would be 10:15 Eastern
21 time, the government stopped asking questions.
22 So our position is this deposition is concluded.
23 If you want another deposition, you'll have to
24 notice us and we'll go from there.

25 MR. HANDLER: The only reason the

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1 witness -- the government stopped the deposition
2 is because your client, Mr. Kelley, refused to
3 ask (sic) reasonable questions, but that did not
4 implicate the Fifth Amendment.

5 And for that reason, the
6 government was not able to continue the
7 deposition. It was not the fault of the
8 government. It was the fault of either the
9 witness or his attorneys.

10 MR. BOURQUE: Look, let's let
11 somebody else decide faults here. Okay? You're
12 a big boy. You know that you don't have the
13 right to put fault on me any more than I have a
14 right to put fault on you. Okay?

15 MR. HANDLER: I'd appreciate if
16 you keep your name-calling to yourself.

17 MR. BOURQUE: It's specifically
18 directed to me.

19 MR. HANDLER: Okay. If you want
20 to act like a child, that's fine. This
21 deposition has been concluded.

22 MR. BOURQUE: Yes, it is. The
23 deposition is concluded.

24 MR. STERN: It has been suspended.

25 MR. BOURQUE: It's concluded.

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1 MR. HANDLER: You know what I
2 mean. We'll let the Court decide.

3 MR. JACKSON: Are we done?

4 THE STENOGRAPHER: Mr. Jackson?

5 MR. JACKSON: Yes, ma'am, please.

6 MR. SCHREIBER: I need one for the
7 plaintiff as well. Send me one for the
8 plaintiff. Electronic.

9 THE STENOGRAPHER: The transcript
10 has been ordered next day.

11 MR. SCHREIBER: No.

12 MR. JACKSON: No.

13 (Deposition concluded at 9:23 a.m.)
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CORRECTION PAGE

WITNESS NAME: MICHAEL SHAWN KELLEY DATE:
06/23/2020

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SIGNATURE PAGE

I, MICHAEL SHAWN KELLEY, have read the
foregoing deposition and hereby affix my signature
that same is true and correct, except as noted on
the correction page.

MICHAEL SHAWN KELLEY

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOE HOLCOMBE, ET AL., §
 §
 PLAINTIFF, § CIVIL ACTION NO.
 § 5:18-CV-00555-XR
V. §
 §
UNITED STATES OF AMERICA, §
 §
 DEFENDANT. §

REPORTER'S CERTIFICATION
DEPOSITION OF MICHAEL SHAWN KELLEY
TAKEN JUNE 23, 2020

I, TAMARA CHAPMAN, Certified Shorthand Reporter
in and for the State of Texas, hereby certify to the
following:

That the witness, MICHAEL SHAWN KELLEY, was
duly sworn by the officer and that the transcript of
the oral deposition is a true record of the
testimony given by the witness;

That the original deposition was delivered to
STEPHEN HANDLER;

That a copy of this certificate was served on
all parties and/or the witness shown herein on

_____.

I further certify that pursuant to FRCP
No. 30(f)(i) that the signature of the deponent:
was requested by the deponent or a party

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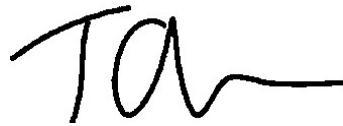
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1 before the completion of the deposition and that the
2 signature is to be returned within 30 days from date
3 of receipt of the transcript. If returned, the
4 attached Changes and Signature Page contains any
5 changes and the reasons therefor;

6 X was not requested by the deponent or a
7 party before the completion of the deposition.

8 I further certify that I am neither counsel
9 for, related to, nor employed by any of the parties
10 in the action in which this proceeding was taken,
11 and further that I am not financially or otherwise
12 interested in the outcome of the action.

13 Certified to by me this 24th day of June, 2020.

14
15 
16

17 Tamara Chapman, CSR, RPR-CRR
18 Texas CSR #7248 (Expir. 04/30/21)
19 Firm Registration No. 77
20 ESQUIRE DEPOSITION SOLUTIONS, LLC
21 9901 IH 10 West, No. 800
22 San Antonio, Texas 78230
23 210.331.2280
24
25

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Exhibit B

GERALD E. BOURQUE

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May 14, 2020

Paul David Stern
U.S. Attorney's Office (W.D. Tex)
601 W. Loop 410, Suite 600
San Antonio, Texas 78216

RE: Cause No. 5:18-cv-00555-XR; Holcombe, et al. v. United States of America;
In the United States District Court for the Western District of Texas – San
Antonio Division

Dear Mr. Stern:

This office is recently hired to personally represent Michael Kelley and Rebecca Kelley during the depositions to be scheduled in the above styled and numbered civil cause. Please forward for review a copy each and every statement given by Michael Kelley and Rebecca Kelley to the Federal Bureau of Investigation, A.T.F., Texas Rangers, United States Air Force, U. S. O.I.G., or any other law enforcement agency in relation to the subject matter which makes the basis of the above referenced litigation.

The incident which makes the basis of this civil litigation was a mass shooting. Had Devin Kelley survived, the United States would have indicted him for intentionally causing the death of several people and the D.O.J. would likely have authorized the pursuit of the death penalty. Any acquaintances of the perpetrator would be investigated as targets for indictment, as well. Therefore, please provide a letter stating that neither Michael Kelley nor Rebecca Kelley are targets of a criminal investigation at this time and that answers they give in response to questions during the deposition will not lead to either of them becoming targets of a criminal investigation with the United States Department of Justice. In other words, provide a letter stating they are not now targets of a criminal investigation and they will never be targets of a criminal investigation for anything related to the Sutherland Springs incident.

Sincerely,



Gerald E. Bourque

Cc: Jamal Alsaffar
Whitehurst, Harkness, Brees, Cheng,
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Exhibit C

DANIEL D. HOROWITZ, III *†
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June 23, 2020

Mr. Paul David Stern
U.S. Attorney's Office (W.D. Tex.)
601 W. Loop 410, Suite 600
San Antonio, Texas 78216

Via E-Mail

Re: Cause No. 5:18-cv-00555-XR, *Holcombe, et.al. v. United State of America*; In the United States District Court for the Western District of Texas-San Antonio Division

Dear Mr. Stern:

As you are aware, I've been retained to represent Ms. Danielle Smith in the above referenced case. Her deposition is currently scheduled for Tuesday June 30th, 2020. Please forward a copy of each and every statement given by Danielle to the F.B.I., A.T.F., Texas Rangers, United States Air Force, U.S.O.I.G., the U.S. Attorney's Office, or any other law enforcement agency in relation to the subject matter which makes the basis of this litigation.

The incident which makes the basis of this civil litigation was a mass shooting. Had Devin Kelley survived, the United States would have indicted him for intentionally causing the death of several people. The D.O.J. would have likely authorized the pursuit of the death penalty. Any acquaintances of the perpetrator would likely be investigated as targets for indictment as well.

Therefore, please provide a letter stating Danielle Smith (f/k/a Danielle Kelley) is not a target of a criminal investigation at this time, and the answers she gives in response to the questions during the deposition will not lead to her becoming a target of criminal investigation with the United States Department of Justice or any state law enforcement agency. In other words, provide written confirmation Danielle is not a target of a criminal investigation and she will never be a target of a criminal investigation for anything related to the Sutherland Springs incident. Should you have any questions, please do not hesitate to contact my office.

Sincerely,

Daniel D. Horowitz